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**ORIGINAL  
FILED**

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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12  
13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 MALCOLM B. WITTENBERG,

17 Defendant.

No. CR-01-0157-WHA

PLEA AGREEMENT

18  
19 I, Malcolm B. Wittenberg, and the United States Attorney's Office for the Northern  
20 District of California (hereafter "the government") enter into this written plea agreement (the  
21 "Agreement") pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure:

22 The Defendant's Promises

23 1. I agree to plead guilty to count two of the captioned indictment charging me with  
24 insider trading, in violation of 15 U.S.C. §§ 78j and 78ff, and 17 C.F.R. § 240.10b-5. I agree that  
25 the elements of the offense are as follows: (1) the defendant was a corporate insider; (2) the  
26 defendant possessed material, non-public information regarding the corporation; (3) the  
27 defendant used the information to purchase or sell securities through a national exchange or in  
28 interstate commerce; and (4) the defendant acted with reckless, deliberate indifference.

1 The maximum statutory penalties are:

- |   |    |                                 |            |
|---|----|---------------------------------|------------|
| 2 | a. | Maximum prison sentence         | 10 years   |
| 3 | b. | Maximum fine                    | \$ 250,000 |
| 4 | c. | Maximum supervised release term | 3 years    |
| 5 | d. | Mandatory special assessment    | \$ 100     |

6 The defendant also is subject to forfeiture of investment and profits, and suspension, disbarment,  
7 or other disciplinary action by the California State Bar.

8 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that  
9 the following facts are true:

10 a. At the times relevant to the charge to which I will plead guilty, I was an  
11 attorney and a partner in the San Francisco office of the Oakland law firm of Crosby, Heafey,  
12 Roach and May ("Crosby, Heafey").

13 b. In August 1999, Sun Microsystems, Inc. ("Sun") agreed to acquire a Crosby,  
14 Heafey client, Forte Software, Inc. ("Forte"). I had previously represented Forte in domestic and  
15 foreign patent matters.

16 c. On the morning of August 16, 1999, a Forte attorney told me about the merger  
17 and asked me to provide certain information to the attorneys performing the due diligence  
18 necessary for the merger. At approximately 12:00 p.m. PST on August 16, I placed a market  
19 order for 1000 shares of Forte stock through my Paine Webber Retirement Account. The order  
20 was filled shortly after it was placed and I purchased 1000 Forte shares at a price of \$13.50 per  
21 share.

22 d. On August 17, 1999, a Sun attorney called me and arranged to review Forte  
23 foreign patent files at Crosby, Heafey's San Francisco office. We discussed the company's due  
24 diligence effort and the merger as the reason for reviewing the files. On August 19, the Sun  
25 attorney visited the Crosby, Heafey office in San Francisco to review Forte's patent files. The  
26 attorney called me from the room and I spoke to him on the telephone regarding a Forte patent  
27 that was formerly owned by another company. At approximately 9:45 a.m. PST on August 20, I  
28 placed a market order for 1000 additional Forte shares through my Paine Webber Investment

1 Account. The order was filled and I purchased 1000 shares at a price of \$14.75 per share.

2 e. The Sun/Forte merger was announced on August 23, 1999, at 8:45 a.m. EST.  
3 At the time the merger closed, my Forte shares converted to shares of Sun. On October 21,  
4 1999, I sold all my Sun shares. My profit from use of the information I received from the Sun  
5 and Forte attorneys was \$14,000.

6 f. When I purchased the Forte stock on August 20, I knew that I was in  
7 possession of confidential, material information regarding Forte. The information was  
8 nonpublic. I used this information in my decision to purchase the stock.

9 g. I stipulate that there is a sufficient factual basis to support my conviction for  
10 insider trading.

11 3. I agree to give up all rights that I would have if I chose to proceed to trial,  
12 including the rights to a jury trial with the assistance of an attorney; to confront and cross-  
13 examine government witnesses; to remain silent or testify; to move to suppress evidence or raise  
14 any other Fourth or Fifth Amendment claims; to any further discovery from the government, as  
15 may be limited by United States v. Ruiz, 241 F.3d 1157 (9<sup>th</sup> Cir. 2001); and to pursue any  
16 affirmative defenses and present evidence.

17 4. I agree to give up my right to appeal my conviction, the judgment, and orders of  
18 the Court. I also agree to waive any right I may have to appeal my sentence, except that I reserve  
19 my right to appeal a sentence within a guideline range above level 11 of the Sentencing  
20 Guidelines.

21 5. I agree not to file any collateral attack on my conviction or sentence, including a  
22 petition under 28 U.S.C. § 2255, at any time in the future after I am sentenced, except that I  
23 reserve my right to claim that my counsel was ineffective in connection with the negotiation of  
24 this plea agreement or the entry of my guilty plea.

25 6. I agree not to ask the Court to withdraw my guilty plea at any time after it is  
26 entered.

1           7. I agree that the following provisions of the Sentencing Guidelines apply, except I  
2 understand that the government will request a two level enhancement for abuse of position of  
3 trust under USSG §3B1.3. I reserve the right to oppose this enhancement.

- |   |    |  |    |
|---|----|--|----|
| 4 | a. | Base offense level, USSG § 2F1.2(a):   | 8  |
| 5 | b. | Specific offense characteristics,<br>amount of gain, USSG §§ 2F1.2(b)(1) and 2F1.1(b)(1)(D): | +3 |
| 6 | c. | Acceptance of responsibility (if I meet the<br>requirements of USSG § 3E1.1):                | -2 |

7  
8 I reserve the right to move for a downward departure. I understand that the government may  
9 oppose any downward departure. Other than as set forth in this paragraph, I will not ask for any  
10 adjustments to or reductions of the offense level.

11           8. I agree that, regardless of any other provision in this agreement, the government  
12 may and will provide to the Court and the Probation Office all information relevant to the  
13 charged offenses and the sentencing decision. I also agree that the Court is not bound by the  
14 Sentencing Guidelines calculations above, the Court may conclude that a higher guideline range  
15 applies to me, and, if it does, I will not be entitled, nor will I ask, to withdraw my guilty plea.

16           9. I agree that I will forfeit \$14,000, which equals the amount of the profits I made  
17 from the use of information I received from Forte and Sun before the public announcement of the  
18 merger. I agree that I will make a good faith effort to pay any fine, forfeiture, or restitution I am  
19 ordered to pay. Before or after sentencing, I will, upon request of the Court, the government, or  
20 the U.S. Probation Office, provide accurate and complete financial information, submit sworn  
21 statements and give depositions under oath concerning my assets and my ability to pay, surrender  
22 assets I obtained as a result of my crimes, and release funds and property under my control in  
23 order to pay any fine, forfeiture, or restitution. I agree to pay the special assessment of \$100 on  
24 the day I am sentenced.

1           10.     I agree not to commit or attempt to commit any crimes before sentence is imposed  
2 or before I surrender to serve my sentence. I also agree not to violate the terms of my pretrial  
3 release; intentionally provide false information to the Court, the Probation Office, Pretrial  
4 Services, or the government; or fail to comply with any of the other promises I have made in this  
5 Agreement. I agree that, if I fail to comply with any promises I have made in this Agreement,  
6 then the government will be released from all of its promises below, but I will not be released  
7 from my guilty plea.

8           11.     I agree that this Agreement contains all of the promises and agreements between  
9 the government and me, and I will not claim otherwise in the future.

10          12.     I agree that this Agreement binds the U.S. Attorney's Office for the Northern  
11 District of California only, and does not bind any other federal, state, or local agency.

12 The Government's Promises

13          13.     The government agrees to move to dismiss any open charges pending against the  
14 defendant in the captioned indictment at the time of sentencing.

15          14.     The government agrees not to file or seek any additional charges against the  
16 defendant that could be filed as a result of the investigation that led to the captioned indictment.

17          15.     The government agrees to recommend the Guidelines calculations set out in  
18 paragraph 7, and will request a two level enhancement for abuse of a position of trust under  
19 USSG §3B1.3. The government further agrees that the defendant may file a motion for  
20 downward departure, but reserves the right to oppose the motion.

21          16.     The government agrees to recommend to the Court that no restitution be ordered  
22 in light of the agreement on forfeiture set forth above in paragraph 8.

23 The Defendant's Affirmations

24          17.     I confirm that I have had adequate time to discuss this case, the evidence, and this  
25 Agreement with my attorneys, and that they have provided me with all the legal advice that I  
26 requested.